

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AXEL ALEX LUCK,

Defendant-Appellant.

UNPUBLISHED

March 29, 2007

No. 266806

Oakland Circuit Court

LC No. 2005-202798-FH

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIUM.

Defendant was convicted by a jury of delivery of less than 50 grams of a mixture containing a controlled substance, oxycodone, MCL 333.7401(2)(a)(iv). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to a term of 1-1/2 to 30 years' imprisonment. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that there was insufficient evidence to support his conviction. We disagree.

An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). The evidence must be reviewed in a light most favorable to the prosecution. *Id.* at 514-515. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

A conviction of delivery of less than 50 grams of oxycodone required proof of the following elements beyond a reasonable doubt: (1) that defendant delivered a controlled substance, (2) that the substance was oxycodone, (3) that defendant knew he was delivering oxycodone, and (4) that the substance was in a mixture that weighed less than 50 grams. See *People v Mass*, 464 Mich 615, 638; 628 NW2d 540 (2001).

The prosecution's theory was that defendant aided and abetted the commission of this offense with his son. To find that defendant aided and abetted in the crime, the prosecution was required to show that (1) the crime charged was committed by defendant or some other person,

(2) defendant performed acts or gave encouragement that assisted in the commission of the crime, and (3) defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he provided aid or encouragement. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006).

The parties stipulated that the substance involved was oxycodone and that it was part of a mixture that weighed less than 50 grams. Furthermore, there was no dispute that defendant knew that he possessed oxycodone, a controlled substance. Thus, the last three elements of the crime were not in dispute. The only issue for the jury to resolve was whether defendant aided and abetted his son's delivery of oxycodone to an undercover police officer.

The testimony of the undercover detective provided sufficient evidence that defendant aided and abetted his son in the delivery of the oxycodone to the detective. According to the detective, defendant was the person who negotiated the deal to sell the oxycodone, and arranged for the sale to take place at defendant's apartment. There was also evidence that defendant gave a statement in which he admitted selling his prescription drugs to supplement his income. Although defendant's son made the actual delivery of the drugs at defendant's apartment, the jury could find beyond a reasonable doubt that defendant knowingly participated in the offense with the intent that the drugs be delivered to the undercover officer.

In arguing this issue, defendant also challenges the admissibility of the detective's testimony identifying defendant's voice over the telephone. Because defendant did not object to the admissibility of this evidence at trial, appellate relief is precluded absent a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

In *People v Hayes*, 126 Mich App 721, 725; 337 NW2d 905 (1983), this Court observed:

A pre-eminent Michigan case in the law of voice identification is *People v Bozzi*, 36 Mich App 15; 193 NW2d 373 (1971), *lv den* 386 Mich 775 (1971). There, this Court noted the language of *State v Karas*, 43 Utah 506; 136 P 788 (1913):

“‘Undoubtedly voice is a competent means of identification, and one by such means alone may be sufficiently identified. In some instances identification by such means may be as ponderous as identification by sight. But the testimony should be reasonably positive and certain, and based upon some peculiarity of the person's voice, or upon sufficient previous knowledge by the witness of the person's voice.’” 36 Mich App 19.

After considering several other cases from outside the State of Michigan, the *Bozzi* Court concluded that certainty must be shown to exist in the mind of the identifying witness by testimony that is positive and unequivocal. Further, some reason must appear to which the witness can attribute the ability to make the voice identification, of which familiarity and peculiarity are the most common, though not exclusive, examples. *People v Bozzi*, *supra*, p 22.

In this case, the detective positively and unequivocally identified defendant because of his distinctive voice. Moreover, the detective was familiar with defendant's voice and could distinguish it from defendant's son's voice because he had spoken to defendant on the telephone approximately six times before he arranged to purchase the drugs at issue in this case. Therefore, defendant has not shown a plain error.

This case did not involve any pretrial identification procedure with defendant's voice, so defendant improperly relies on *People v Kevin Williams*, 244 Mich App 533, 542-545; 624 NW2d 575 (2001), to argue that the identification of defendant by his voice should have been excluded. Likewise, the case did not involve any voiceprint or spectrographic evidence, so defendant's reliance on *People v Tobey*, 401 Mich 141, 145-148; 257 NW2d 537 (1977), is also misplaced.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant aided and abetted in the delivery of less than 50 grams of oxycodone.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder